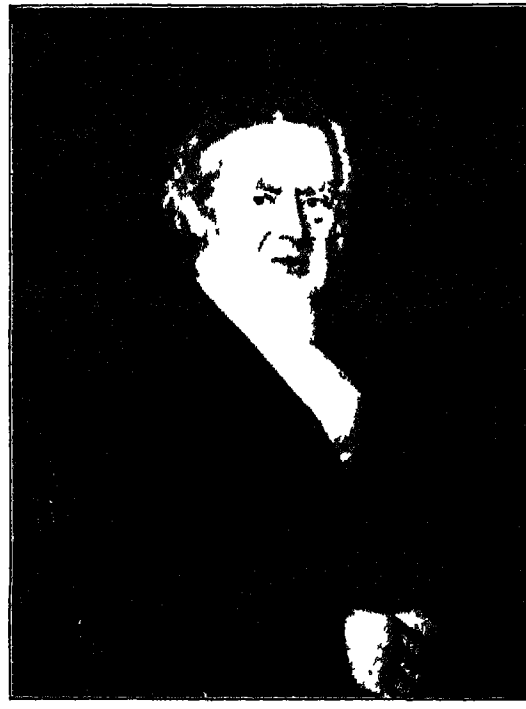
ANDERS SANDØE ØRSTED AS A JURIST



Anders Sandøe Ørsted.

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AS A JURIST

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To

Professor Roscoe Pound.

PREFACE.

The substance of this occasional essay is a paper read by the present writer to a Danish society of lawyers and published in 1927. Alterations have been made, because the public for which this booklet is intended cannot be presupposed to have the knowledge of specific facts that Danish hearers or readers possess.

The translation into English of the original text was first prepared for private purposes by Mrs. *C. C. Williams, Jr.*. This version has subsequently been enlarged and thoroughly revised by my son, *Torsten Dahl*, »Docent« of English in the University College of Aarhus, who has also assisted me in reading the proofs. To both my sincere thanks are due.

Finally, I wish to acknowledge my indebtedness to the *Rask-Ørsted* Foundation for a grant towards the printing of my essay.

Copenhagen, March, 1932.

Frantz Dahl.

I.

In his story »Himmelbjærget« the Danish poet Steen Steensen *Blicher* relates of the poet Stolberg that when his German rendering of Homer was progressing in the best manner imaginable he would fling down his pen and cry in despair, »Reader. Learn Greek and burn my translation.«

One is tempted to do likewise in the face of the subject of this modest essay: *Anders Sandøe Ørsted and his importance in Dano-Norwegian jurisprudence.*

Varying the words of Stolberg the writer feels inclined to say, »Read Ørsted. Study him and the ages preceding and succeeding his work;« and readers, no doubt, will have the experience familiar to all students of Ørsted: The farther one penetrates into the mind of this genius, — undoubtedly one of the greatest intellects of Denmark, — the more one is filled with admiration for the enormous mental power and exceptional

character of this man. Yet, at the same time, one feels the difficulty, nay, almost the impossibility — at any rate within the limits of an essay — of painting a tolerably faithful portrait or of characterizing him in a manner even passably adequate. One cannot empty the ocean.

Goethe once remarked to Eckermann, on the subject of Shakespeare, that you could not describe him at all; it would all be insufficient — *alles unzulänglich* —, and this applies, mutatis mutandis, to Ørsted. An inquirer into the work of this seeker after truth will realize the greatness and depth of his mind. Apart from legal history, there is no phase of law, as it existed at the time, upon which he has not expressed himself with unique acuteness, penetrating judgment and clarity of vision. Active in many fields, Ørsted exercised a multifarious influence on Danish science and Danish history, so that the task of properly ascertaining the scope of his mind and the magnitude of his achievement will require a great many collaborators.

It is a significant fact that when in 1878, on the occasion of the Ørsted centenary, a prize was offered for an essay on the man and his scientific work, no one writer dared come forward, but that three men undertook the labour jointly.

They were J. Nellemann, Minister of Justice, H. Øllgaard, a judge of the Supreme Court, and C. Goos, a professor of law, and the outcome was a well-known work on Ørsted's importance in the respective spheres of procedure, private law, legal philosophy and criminal law.

Ørsted's politics have been treated amongst others by the historians L. Koch, a clergyman, and Marcus Rubin, a director of the National Bank of Denmark.

But various aspects of Ørsted's activities still wait for treatment. His earliest writings were of a philosophical nature. Even as a very young man he had familiarized himself with Kantism more than any of his contemporaries. As early as 1800 Peter Erasmus Müller[1]) referred to Ørsted, then a youth of 22, as »one of our keenest and best informed students of Critical Philosophy«, but philosophers still owe us a detailed account of the efforts made by Ørsted to expound Kantian ideas, not only in his prize-essay »Over Sammenhængen mellem Dydelærens og Retslærens Princip« [»On the Relation between Morals and Law«] (I—II, 1798), but also elsewhere. All Danish and Norwegian lawyers know the extra-

1) 1776—1834; a professor of divinity, Bishop of Zealand, historian and philologist.

ordinary and thorough influence that Ørsted exerted on the legislation of his age, witness the four Ørstedian systematic criminal laws,[1]) the Succession Decree of May 21, 1845, which is still in force, and many others.

Also this important aspect of his work requires further investigation. The same observation is true of Ørsted's activities as a government official, as a law-officer of the Crown, as a member of important royal commissions, etc. It is not until recent years that Ørsted's judicial work has been made the subject of a monograph. Thus we may point to a rich mine of records bearing upon Ørsted which has not been worked yet.

In the various fields of economics, too, Ørsted did work which excites the admiration of modern economists. He had a remarkable comprehension of things which often escape even the theorists of to-day. The financial reconstruction in Denmark after the national bankruptcy of 1813 was no doubt primarily due to Ørsted. Familiar with economic literature, especially with English

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1) respectively of Oct. 4, 1833 (Wrongs to personal safety and liberty), of April 11, 1840 (Theft, forgery and related crimes), of April 15 of the same year (False evidence and perjury); of March 26, 1841 (Arson). These were only superseded by the Criminal Code of February 10, 1866.

writings, he proved himself, according to Professor Axel Nielsen, to be eminently capable of sound reasoning and action in economic matters. This is particularly true of his exposition of the difference between the legal and the economic conception of money, his reasonings with regard to the different possibilities that presented themselves in 1813, etc. So far, however, no monograph on Ørsted as an economist has appeared in spite of prizes having been offered in order to stimulate an interest in the subject. But surely this aspect of his enormous achievements will be elucidated some day.

II.

In the wide field of law Ørsted is Denmark's greatest name. Nor do Norway, Sweden or Finland boast law-writers who are fit to hold candles to him. The foremost jurist of the last-mentioned country, *Matthias Calonius*,[1]) a somewhat older contemporary of his, might remind us of Ørsted, combining as he did theoretical knowledge with practical legal sense. Yet he did not possess Ørsted's deep insight into philosophy. As a thinker Calonius could not free himself from the narrow and painful shackles of the Law of Nature, and he lacked the originality of genius. Ørsted's slightly younger colleague, *Johan Gabriel Richert*,[2]) the chief legist of Sweden in the nineteenth century, was prominent as a legislator, but wrote next to nothing. Even the Norwegian *Anton*

[1]) 1737—1817; a professor and legal adviser to the Finnish government.

[2]) 1784—1864.

Martin Schweigaard,[1]) the continuator in his own country of Ørsted's work, though great as a jurist and as a man, must yield precedence to his teacher. Anders Sandøe Ørsted the jurist is of world proportions. The legal renaissance that he inaugurated in Denmark has no parallel in the great civilized countries. Even his most renowned contemporaries, men such as *Anselm von Feuerbach* and *Friedrich Carl von Savigny*, were *specialists*, though certainly on the grand scale, the former being a criminologist and the latter a civilian. Spell-bound by Roman law, Savigny was a stranger to the growing Germanic movement.

But Ørsted has shared the fate of nearly all the great men of Denmark. Outside of Denmark and Norway he is practically unknown. In countries like France, England, and the United States his name has not been heard of.

Thus the magnificent work »Great Jurists of the World«, published in London by *John Macdonell* and *Edward Manson* in the year 1913, while it mentions the talented German *K. J. A. Mittermaier*, has no space for Ørsted. Nor is the knowledge of him much better even in Germany.

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[1]) 1808—70; a professor of law at Oslo, economist and statistician.

Thanks to the three volumes »Abhandlungen aus dem Gebiete der Moral- und Gesetzgebungs-Philosophie« (I—III, Copenhagen 1818, 1823 and 1826) which he himself placed before German readers, Ørsted is cited to-day in German and Austrian text-books and dissertations, but only as a criminologist among a hundred others, although often with much praise (for example by *Heinrich Lammasch).*

Germany, to her no small loss, has never been alive to Ørsted's real greatness. Many aspects of German legal science would no doubt have appeared different, much superfluous discussion (and a certain amount of national self-esteem) might have been spared if his works had been seriously investigated. Apparently the state of German jurisprudence demands that, even in our own day, Ernst Immanuel Bekker, a jurist of high standing, should emphasize the relativity of law and the view of law as the work of man[1]) while inculcating on us the proposition that law is no definite conception, but something relative embracing not only »yes« and »no«, but also a »more« and a »less«. A couple of decades ago it was claimed in Germany that the problem of interpreta-

[1]) *E. I. Bekker:* Das Recht als Menschenwerk und seine Grundlagen. (Heidelberg 1912).

tion of the law had been solved in an ingenious way hitherto unknown. But to Danish legal science, which had adopted the teachings of Ørsted, the deductions of the writer in question contained nothing new. Ørsted was a hundred years ahead of his German colleague, Erich Danz, only the latter had a world-language at his disposal.

Altogether, as a legal thinker Ørsted was in advance of his age, though not in the facile, amateurish manner which creates paradoxes and catchwords merely to dazzle with something new. Nor was he a scientific destructionist who demolished instead of constructing. He simply thought more deeply, more sanely and more truthfully than others.

Unfortunately it is difficult, nay, almost impossible to translate Ørsted. In the remarkable range of his writings a monumental single work is lacking. Dealing with a poet like Adam Oehlenschläger one may point to »Sankt Hans Aftenspil« and »Aladdin«, and, in the case of a thinker like Søren Kierkegaard, to »Afsluttende uvidenskabelig Efterskrift«, »Stadier paa Livets Vej«, »Enten—Eller«, etc. as milestones marking their literary paths. But when we come to speak of Ørsted anything similar can hardly be done. Owing to human folly Ørsted was obliged to ap-

pend his most important works as notes to the text-books which the University of Copenhagen was content to admit to its curriculum, and, for the rest, to employ the form of monographs and treatises. Yet, in all of Ørsted's works, no matter how they appeared, there are ideas, expositions, suggestions sufficient to furnish dozens of lesser writers with material.

Oddly enough, very little is found which will shed light on Ørsted's personality. Possibly he destroyed letters and papers, for very few of these have survived. From his comprehensive work »Af mit Livs og min Tids Historie« (From the History of My Life and My Times[1])) we certainly obtain a definite impression of his character, but this book, like Ørsted's other writings, is concerned with actual facts, his idea being to present a clear account of political and financial events in which he had played a prominent part, not to talk about himself. Thus Ørsted contrasts pleasantly with some of our present-day memoirists who, young though they are, indulge themselves in publishing records of the insignificances of their private lives. He did not wish to pose as a martyr when he was not made a pro-

1) I—IV (Copenhagen 1851, 1852, 1855, 1857).

fessor, nor did he deem it proper to obtain publicity out of the events of 1826, when the absolute monarch, under the influence of F. J. Kaas, a minister of the Crown hostile to Ørsted, forced this brilliant and prolific writer to discontinue authorship, because he had published a paper dealing with ecclesiastical law at the time of a doctrinal controversy within the Church. In so doing, it was argued, Ørsted had prejudged a case upon which he might yet be required to give his official opinion.

Naturally Ørsted realized what he was worth, as we know from Oehlenschläger's remark in his Reminiscences about himself and the brothers Ørsted that in their youth they all believed they would do something unusual and achieve fame. But wedded to this legitimate self-esteem we find in Anders Sandøe Ørsted true modesty. He never boasted of his mental superiority. While he loathed intellectual humbug and scientific frivolity, he was always willing to recognize merit in others. Indeed, it is almost touching to behold the generous understanding with which he helps forward younger literary talents, such as J. L. A. Kolderup-Rosenvinge, the legal historian, J. O. Hansen, the authority on procedure, and others. A rare exception is the touch of irritation he

evinced when the future law-officer Tage Algreen-Ussing in his early writings on private and criminal law ventured to bag so freely from the field Ørsted had beaten up that the case almost amounted to one of plagiarism. Ørsted's was a character pure and stainless. The poet rightly says of him:

> For the thinker wise we saw
> With a childlike innocence.

One thing is certain, that he was conscious of possessing the strength required by the pioneering work which lay ahead.

Also that he was fully aware both of the road and the goal when he determined to create a national legal science.

III.

A brief account of Ørsted's life and fortunes may not be out of place. He was born in the town of Rudkøbing on December 21, 1778 and died in Copenhagen on May 1, 1860. An elder brother of his was Hans Christian Ørsted, the famous physicist, to whom he was closely attached throughout his life. Ørsted graduated in law (1799) and took up a judicial career, becoming a judge of the Court of Appeal (1801) and of the Supreme Court (1810). He became familiar with administrative work in his capacity of commissioner of the »Danske Kancelli« (1813—48). From 1825 to 1848 he served as law-officer to the Crown, being a member of the Government for the last six years of his term of office. Sub-

[1]) His chief writings are: The academic prize-essay of 1798 mentioned above (p. 11); »Forsøg til en rigtig Fortolkning og Bedømmelse over Forordningen om Trykkefrihedens Grænser, dateret 27. September 1799« (I 1801), i. e. Attempt at a True Interpretation and Judgment as to the Decree Concerning the Li-

sequently Ørsted was appointed Prime Minister with two departments (Home Affairs and Education) under him (1853—54).

The rejection of Ørsted (1799) in the competi-

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mits of the Freedom of the Press, dated Sept. 1799; »Supplement til Nørregaards Forelæsninger over den danske og norske private Ret« (I—III 1804, 1806, 1812), i. e. Supplementary Notes to N's Lectures on Danish and Norwegian Private Law; »Systematisk Udvikling af Begrebet om Tyveri« (1809), i. e. Systematic Treatise on the Conception of Theft; Pamphlets on the occasion of the deterministic controversy raised by Professor F. G. Howitz; »Haandbog over den danske og norske Lovkyndighed« (I—VI 1822, 1825, 1828, 1831, 1832, 1835), i. e. Manual of Danish and Norwegian Legal Materials; a multitude of treatises; a number of writings on constitutional law and politics, e. g. »Prøvelse af de Rigsforsamlingen forelagte Udkast til en Grundlov og en Valglov« (1849), i. e. An Examination of the Draft Constitution and the Electoral Bill Submitted to the Constituent Assembly; »For den danske Stats Opretholdelse i dens Helhed« (1850), i. e. In Favour of the Maintenance of the Kingdom of Denmark in its Entirety. Edited the voluminous periodicals »Juridisk Arkiv« I—XXX 1804—12, i. e. Juridical Archives; »Nyt juridisk Arkiv« I—XXX 1812—20, i. e. New Juridical Archives; »Arkiv for Retsvidenskaben I—VI 1824—31, i. e. Archives of Legal Science; »Juridisk Tidsskrift« I—XVI 1820—30, i. e. Legal Times. The substance of these is due to his indefatigable pen.

»Skrifter i Udvalg« (Selected Writings) edited by Troels G. Jørgensen (so far 4 volumes, 1930—31). Cf. Axel Rafael: Register til A. S. Ørsteds Skrifter (1917), i. e. Index to A. S. Ørsted's Writings; and Henny Glarbo: Person- og Sagregister til A. S. Ørsteds Skrifter og Taler af historisk, politisk og statsøkonomisk Indhold (1921), i. e. Index of Persons and Subjects to A. S. Ørsted's Writings and Speeches Dealing with History, Politics and Political Economy.

tion[1]) for a post in the University of Copenhagen represents one of the darker pages, if not the darkest, in the history of the Alma Mater otherwise so glorious. Ørsted himself no doubt took the verdict as an insult. Yet he refers to the matter in the »History of My Life and My Times«[2]) in the most dignified fashion; nor can he have failed to realize that his practical activities were the surest means of preventing his theories from becoming petrified.

In the preface to the first volume of the above-mentioned »Abhandlungen« published in German, Ørsted speaks of himself as a »business-man«, not a real scholar.[3]) Again, in a letter to

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1) It was the future professor Matthias Hastrup Bornemann, 1776—1840, a legal philosopher and criminologist, who was appointed.

2) L. c. I (Copenhagen 1851) p. 37.

3) L. c. I (Copenhagen 1818) p. XVII: »Unter andern bitte ich in Betracht zu ziehen, dass der Verfasser kein eigentlicher Gelehrter, sondern ein Geschäftsmann ist, welcher neben zahlreichen Amtsgeschäften, soweit es Zeit und Vermögen erlaubten, die Bekanntschaft mit der Wissenschaft sich zu erhalten, und die Resultate seines, grossentheils durch practische Arbeiten veranlassten Nachdenkens mitzutheilen gesucht hat« (i. e. Among other things, I beg you to bear in mind that the author is not a genuine scholar, but rather a business-man who, so far as the opportunity has presented itself during a number of terms of office, has sought to keep himself posted in scientific matters, and to communicate the thoughts and results reached by him largely through practical work).

the Secretary of State Poul Chr. Stemann, of May 18, 1820, in the course of which he requested the latter to cause the ban on his literary activities to be revoked, he adds that »The restriction to which I have been subjected, may not be without detriment to the public good.

Probably no small damage has resulted from the fact that the legal science of more recent times has been almost exclusively in the hands of pure theorists, whose knowledge of the conditions to which the law relates infrequently possesses the requisite accuracy and clarity. With the Romans it was quite different«.

Ørsted's deplorable exclusion from the University sufficiently explains the form of his writings. It had been his intention to work out a complete system of Danish law; but, as hinted above, he was forced out of his course, before that opportunity arrived. Only at this time of day have we come to a full understanding of the circumstances relating to the ban which was placed on Ørsted's activities as a writer. When, in comfortable palliation of the action of Frederick VI, some plead that Ørsted most likely had written himself out by that time, this plea is worse than none. The age of forty-seven, which he had then reached, is no turning-

point indicative of such a decline in the lives of normal authors, let alone a genius like Ørsted. His later activities, literary as well as political, do not suggest a senile mind. By all competent judges his great writings on constitutional law and politics together with his four-volume autobiography are reckoned among the principal authorities for the recent history of Denmark.

The present writer has previously compared the outrage perpetrated on Ørsted by the Government to the disgraceful action which Frederick William II, King of Prussia, and his Minister J. C. von Woellner took against Kant. The difference, if any, is that, at the time of the catastrophe, Ørsted was in the prime of manhood, while Kant, when his liberty of teaching was interfered with, had completed his seventieth year, and, in the course of nature, the state of his faculties would not permit of further creative work.

Ørsted had formulated his scientific programme by making a study of legislation, of the practice of earlier times, and of his most important Danish teacher, Henrik Stampe.

Briefly it read: »To bring life and legal science closer together should no doubt be the aim of a true and beneficial legal science«. This sounds

most obvious. It has indeed become so in Danish jurisprudence, but precisely because Ørsted laid down and, as far as he was concerned, carried out this programme, the elaboration of which he left to his successors. At the time, however, it was not obvious, and there are instances in which it has barely become so yet. It was not Jhering that inaugurated juridical realism; and Goos is given too much credit by those who maintain that *he* broke with the tendency of the older School to deduce the body of legal doctrines from transcendental postulates. For this departure originated with Ørsted, the first genuine realist in legal literature.

IV.

What, then, did Ørsted achieve as a jurist? The answer is simple, yet comprehensive: he created Dano-Norwegian legal science, a national science. Ørsted laid the foundations upon which the jurisprudence of Denmark and Norway rests to-day. It has not progressed beyond him.

Ørsted broke with the older Law-of-Nature School, being the first among Scandinavian jurists to comprehend the true relation existing between law and morals. Again, he made positive law paramount and indicated the proper angles from which interpretation of the law should proceed. Finally, he gave currency to European ideas, not like an unquestioning imitator, but like one who wanted to assay and weigh for himself.

All over the world, the history of law offers striking phases, some of which are mysterious, such as the reception of Roman law in Germany. That country, though possessed of copious na-

tional sources of law, has been found to accept, if not at once, then during a relatively short time, an extraneous legal system. And to such an extent, both in practice and in theory, that the smouldering Germanic opposition does not burst into flame until the nineteenth century. In the case of Denmark, it is something of a puzzle that a national work like Christian V's Danske Lov (Danish Code) of April 15, 1683, mainly a growth out of native legal soil, did not give rise to an indigenous legal literature, nor even to an exegetic account of the substance of the Code, commentaries on it, or the like. Many reasons can be stated for this fact, such as lack of understanding at the University: the professors were Germans who had been called in to teach, yet they had no knowledge of the laws of the country, nor were they interested; only in 1617 was a Dane, Claus Plum, installed as a professor of jurisprudence. Then there was the practice of budding lawyers going abroad for long periods to study at foreign universities, where Roman law and Canon law were flourishing. Incidentally, a first-hand investigation of this important stage of legal history is overdue from Danish students. However, we have also an answer from an observer upon whose knowledge and sound judgment

one may safely rely, viz. from the father of Danish legal history himself, Professor Peder Kofod Ancher.[1]) In a primer of 1755 »En kort Anviisning i sær for en dansk Jurist angaaende Lovkyndigheds og Staats-Konstens adskillige Deele, Nytte og Hjelpe-Midler« (A Short Guide, Particularly for a Danish Lawyer, to Various Departments of Legal and Political Science with Remarks on their Utility and Aids to Study) Ancher writes somewhere: »When first the Code of Christian V was promulgated, it was deemed to be so clear and explicit as to require no explanation. Besides, the art of interpretation has come to be regarded as a *regale* with which no subject has any right to occupy himself.«[2]) It should be observed at once that, in the same breath, Ancher speaks of these theories as being surely incorrect. The »theories« to which he refers, are, without doubt, the doctrines taught at the University by his predecessors, the very learned, yet unproductive *Chr. Reitzer,*[3]) who, in 1692, took over the chair of law, and *Henrik Weghorst,*[4]) doctrines that had a certain backing

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[1]) 1710—88.
[2]) L. c. p. 50.
[3]) 1665—1736.
[4]) 1653—1722.

in various laws and administrative decisions, such as the Supreme-Court Ordinance of June 25, 1670.

That a view such as that held by Reitzer fatally hampered legal research is obvious. Nor did it mend matters that scholars superstitiously considered Law-of-Nature systems and Roman law to be more worthy of study than the law of the land. If there were exceptional cases of greater discernment, the melancholy truth remains that vigorous and purposeful efforts to create a national legal science were not in evidence until about the middle of the eighteenth century.

»In our own day,« says Ancher, »we are beginning to realize that to become a profound Danish lawyer it is not enough to have attained some proficiency in *Jure Romano-Germanico,* but that our own jurisprudence should in reason be the subject of a separate study. The late »Etatsraad« Hojer, a man of great genius and wide erudition, deserves credit not only for being the first among us to make *Studium Juris* flourish, but also for his work as Professor Juris in the University, where he admonished his hearers to be particularly close students of the jurisprudence of this

country.«[1]) Hojer indeed ushered in an age of several new and salutary developments.[2])

If, however, we peruse the programmes of university courses or examine the unprinted lectures given by Hojer's successors *Henrik Stampe,*[3]) *P. Kofod Ancher, B. G. v. Obelitz,*[4]) *J. E. Colbiørnsen*[5]) and others, we shall find that the old spirit was not dead yet. Legal teaching was still based on printed text-books of Roman-German jurisprudence, such as those of G. A. Struve[6]) and J. G. Heineccius. This was done even by Ancher, who, referring to the lines on which he taught, states that, following the example of Hojer, he »would take every pains to bring out everything which might shed light on our own laws. I was particularly anxious to find analogies in our law in order to build up a sound scheme of Danish and Norwegian jurisprudence, according to the fundamental rules of the systematic method of instruction.«[7]) And surely

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[1]) L. c. p. 51.

[2]) Andreas Hojer (1690—1739) The law schools were introduced by a decree of February 10, 1736.

[3]) 1713—89; a professor, law-officer, minister of the Crown.

[4]) 1728—1806; a professor.

[5]) 1744—1802; a professor, president of the Supreme Court.

[6]) *Jurisprudentia Romano-Germanica forensis.*

[7]) L. c. pp. 54—55.

these data, briefly sketched though they are, justify the conclusion, which, incidentally, is supported by present-day analogies, that the influence from abroad was powerful enough to hinder the growth of national legal ideas. Indeed, we are faced by the sight of Roman reasoning and method being drilled into law students at the University simultaneously with the use in practice of Danish legal rules and Danish legal conceptions. It is significant of the stage which Ørsted's development had reached that, with the insight of genius, he intuitively perceived the sources from which he should draw.

His immediate predecessors, if the term may be employed, Professors *L. Nørregaard*[1]) and *F. T. Hurtigkarl*,[2]) did not represent any progress in the sphere of jurisprudence.

Nørregaard, in his writings on legal philosophy, followed the diffuse demonstrative method of the Wolfian system. His big dogmatic work, somewhat incorrectly entitled »Forelæsninger over den Danske og Norske Private Ret« (Lectures on Danish and Norwegian Private Law), was written in the dreary old paragraphic style. A purely descriptive book to all intents and

[1]) 1745—1804.
[2]) 1763—1829.

purposes, it gives brief definitions without any real analysis or exposition of concepts.[1]) And Hurtigkarl, that sad anachronism, lectures and writes, as if Ørsted and Savigny had never existed.

Among pre-Ørsted writers, besides Stampe, who is commended by Ørsted himself, mention should be made of P. Kofod Ancher, who chiefly, it is true, contributed to legal history, but who, also as a metaphysician, deserves to be made the subject of a comprehensive study. Judge C. D. Hedegaard's »Juridisk-Practiske Anmærkninger til Danske og Norske Lov« (Juridico-practical Notes on Danish and Norwegian Law) (I—VI, Copenhagen, 1764—80) is of a certain importance, too.

Anders Sandøe Ørsted as a writer must be viewed against this background. His literary output, even measured by volume, is quite a literature in itself. Pre-Ørsted jurists, as a rule, did not make any thorough investigation of the several jural relations. Nor did they really sift

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1) Thus the problem of the justification and purpose of punishment is disposed of in the following simple fashion: »Punishment (poena) is generally a piece of physical discomfort linked to a piece of moral discomfort«, see Nørregaard l. c. IV (1788) § 1004, p. 5. This brief specimen will probably suffice.

the body of laws available, and it was only rarely that they gave a practical and balanced account of the various conditions of life. Thus, to put it briefly, they lacked what is eminently characteristic of Ørsted's writings and indeed represents the hall-mark of genuine students of things legal. The notion is certainly mistaken that Danish legal literature, prior to Ørsted, does not possess treatments say of interpretation of the law, or of the department that, systematically speaking, is called the general part of private law. Kofod Ancher, for instance, was a worker in this field. But he was merely one swallow, and, as is well known, one such does not make a summer.

V.

The generation that was engaged in literary work when Ørsted grew up preparing himself for the task before him, had been bred and trained on a diet of Wolfian systematism and natural-law ideas. According to an ancient dream never wholly abandoned, there is a fixed, immutable law, the Law of Nature, necessary for all ages and places alike, which dream finds its parallel in the world of morals, where it can be conceived and indeed is maintained by many that there are ethical or moral laws which are not bound to time or place, but remain eternally valid. Space will not permit the writer to attempt, even vaguely, to paint a picture of the powerful minds from which the natural-law conception has sprung. For several centuries the greatest thinkers, philosophers, jurists, theologians, and so forth have held the principles of Natural Law; and the current unreserved condemnation of the Law of

Nature is, in general, based on ignorance of its historical importance. There is not, as yet, any quite adequate answer to the question of how great the influence of Law of Nature has been upon positive law and upon law as applied in practice. While Roman law, with its technical and juridical superiority over domestic systems of law, was regarded as absolute legal sense, as *ratio scripta,* there was scarcely room for the autocracy of Natural Law. Only when it became apparent that Roman law in a pure state could not be applied to the legal dealings of more recent times and accordingly had to be transformed to fit the conditions of practical life, did the Law of Nature begin its victorious progress. There was a clash of legal doctrines, each of which claimed validity for itself, and emerging from this conflict natural-law notions consciously grew into predominance. Law-of-Nature theorists, basing themselves on firmly established principles, worked out a complete system, for which they demanded recognition, even as against the provisions of positive law. This will prove to be a serious deficiency when the merits and the demerits of Natural Law come to be balanced. But then it might be suggested that on the books of human civilization its functions of critic and reformer should be credited

to the Law of Nature; thus, in the field of criminal law, its protection of the subject against the arbitrary power of the state *(nullum crimen sine lege).*

However, what was overlooked by Natural Law was discerned by Ørsted. Like Kant and Fichte, he took it for granted, in his early works, that it was possible to derive all ethical and legal precepts from some few, or ultimately from simply one rational principle. Yet he soon realized, as he writes somewhere in his masterly treatise »Over Grænserne mellem Teori og Praxis i Sædelæren« (On the Boundaries between Theory and Practice in Moral Philosophy),[1]) one of his principal works and, at the same time, a principal work of Danish scientific literature, that, besides general ethics, there was also an individual standard of moral conduct. It became a fundamental idea with him that all further growth, all progress, and all development could not be deduced from general conceptions and assumed dogmas, but ought to be founded upon experience: it is impossible to start from general propositions postulated by a process of pure reasoning, and then simply proceed to apply them

1) Eunomia I (1815) pp. 94 ff.

to the problems of life. We must know what stage of development life has attained in order to ascertain the basic principle that will order and guide life; nor will our ideas ever exhaust the wealth and the several peculiarities of reality. In other words, Ørsted here gave the coup de grâce to the Law-of-Nature concept of law as a constant, general, objective phenomenon. While Savigny, the leader of the Historical School, referred to history, Ørsted pointed to actual life. Savigny looked upon the legal conditions of practical life with Olympian detachment, and, truth to tell, he was, if anything, a failure as Prussian Minister of Legislation. No one can dispute the very great importance of Savigny, which certainly received full recognition from Ørsted. Yet, by virtue of the scientific principles underlying it, Ørsted's work, more than Savigny's, revealed a knowledge of what is the inmost secret of jurisprudence. He is nearer to the imperishable than was Savigny, who even to-day is the subject of criticism. Attacks amounting to charges of ideology are being made by modern Free-Law teachers on Savigny and the followers of the Historical School, some members of which, and those not unimportant, drifted into philological and antiquarian studies. But the apostles of Free Law

would not have denounced Ørsted along with those »idea-mongers« for the very reason that to him the study of law was a practical task, and because he insisted that the legal order was concerned with living human beings, in fact with the living world.

Ørsted, however, had to solve yet another problem, which is indissolubly united with the statements just made, viz. the metaphysical basis of law. At the beginning and at the end of legal science, says Otto Gierke, there is always the question: »What is law?« That question had been answered by all Ørsted's Danish predecessors, if they answered it at all, in purely deductive fashion, from the dogmatic point of view of the Law-of-Nature School. Ørsted, realizing the unsatisfactoriness of this method, was the first Dane to undertake a most penetrating, closely reasoned inquiry as to the foundation and extent of the legal understanding. He asked and answered the fundamental question of the relation between law and morals, and proceeding with proper discrimination he happily avoided the previous confusion of the two.

While the poetic revival brought about by Oehlenschläger had harbingers like Johannes Ewald, it seems as if an entirely different tongue

had been employed by Ørsted's predecessors. A single example will illustrate this.

In his »Natur-Rettens første Grunde« (First Principles of Natural Law — Copenhagen, 1784) § 268, pp. 150—151 Nørregaard says:

»*Security* is a state in which one deems oneself free from harm in the future. *Insecurity* is the opposite.

Any one will readily perceive that insecurity amounts to incompleteness; security, on the other hand, to completeness. Now if an individual has an absolute right to anything he needs in order to further his own completeness and provide against his incompleteness, it follows that an individual has an absolute right to all the means without which he cannot feel secure as to the future.« Confronted with these propositions, one is tempted to exclaim with the Jester of the Sultan Soliman in Oehlenschläger's »Aladdin«: »Such are the words indeed; I am not joking.«

With the above passage we should compare the following exposition taken from Nørregaard's treatment of Criminal Law:[1]) »We have shown that, in the Law of Nature, every individual has a right, for the sake of his security, to punish the man who has insulted him; also, that this right is indefinite, that is to say it extends as

[1]) Privatret IV (1788) § 1004, p. 6.

far and may involve as much evil as will be required by circumstances in order to achieve security in the future.«

In other words, it is a mere deduction from a postulated general principle or axiom. And then think of Ørsted's famous criticism[1]) of the grounds on which ownership was universally based in those days. Here again we meet with the protest against absolute deduction from an absolute principle brilliantly and convincingly voiced.

Ørsted sharply remarks of the writers who declared ownership to be an inalienable right of mankind, nay, the most sacred of all rights, that they »surely never thought in writing this«.[2]) Ørsted certainly did think. Using the »common sense« which he modestly mentions, he noted the pulsations of life about him. He had an eye for the social considerations to which the out-and-out individualistic theory is blind. Passing from the Law-of-Nature teachers to Ørsted one seems to enter an entirely different world. While the realm of Natural Law is unknown and foreign to us, that of Ørsted is familiar to all of us.

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[1]) Ørsted's Eunomia I (1815), pp. 1 ff, the treatise on »Regeringens Ret til at ophæve eller forandre Stiftelser, som private Mænd have oprettet« (the right of the Government to terminate or alter endowments established by private persons).

[2]) L. c. p. 17 note.

VI.

It would be impossible, as far as the several branches of law are concerned, to relate at length the immense progress that the name of Anders Sandøe Ørsted stands for. Even considerations of space oblige the writer to be content with a reference to the documented account in the abovementioned work of Nellemann-Øllgaard-Goos, and to an admirable paper contributed by Professor H. Munch-Petersen to the Danish periodical »Ugeskrift for Retsvæsen« (1901).

It is also difficult to single out details, yet all is said, when it can be stated without exaggeration that the age immediately following him depends entirely upon Ørsted, and that the present times have not gone beyond him. In our own day problems have emerged that only slightly, or perhaps not at all, engaged the minds of Ørsted and his contemporaries. A sociological or ethnological school has arisen within jurisprudence. In the field

of comparative law work is being undertaken in a different way. Again, the law of property has seen the growth of patent law, insurance law and other novelties, which are connected with the economic life and notions of the age. Commercial law and the law of bills of exchange have become a legal system of world-wide importance, and international private law is being cultivated more and more. The social unrest of the times has given rise to social-complexioned legislation. Yet all this does not detract from the value of Ørsted's services to the legal life of to-day. Breaking new ground he opened up fertile fields of black mould in the stony desert of Dano-Norwegian jurisprudence. In the sphere of private law his contributions to the doctrines of interpretation of the law, analogy, custom and its relation to law, the retrospective effect of law, etc. represent the spade-work of a deep digger. He investigated the question of the binding force of the pure promise of marriage, and he cleared up the problem of the right of minors to self-acquired property. In the law of things he laid down the concept of ownership that has been adopted by modern times. We may also point to the systems of the law of obligations now current. Here the doctrines of bonds, damages, nego-

tiorum gestio, condictio indebiti, etc. recall Ørstedian theories, some of which have met with criticism and have been rejected, only to be reaccepted again. Of all it is true that they cannot be passed over in silence. They remain the bedrock on which research may be built.

The pre-Ørsted literature on legal procedure, according to Nellemann's sweeping statement, was of no scientific importance. In these fields, too, Ørsted was an originator. The entire general part of civil procedure is due to him. It was he who developed the chief fundamentals of procedure, such as the question of counter-claim, the rules of intervention, the doctrine of judicial proof, the concept of legal certainty, the apportionment of the burden of proof, voluntary confession, evidence, partial incompetency of witnesses, inspection and survey, documents, oath of the party, costs of proceedings, the doctrine of voting. Further, in criminal procedure, the doctrine of extraordinary proof of theft, circumstantial evidence, etc.

What has just been said about legal procedure is applicable to criminal law, too. Ørsted carried out, for Denmark and Norway, a revision of the fundamental principles of criminal law, a revision which fully equals the brilliant achievement

of Anselm von Feuerbach at the beginning of the century.[1]) If Ørsted did not leave off seeking a foundation for criminal law in philosophy, the practical exposition of his theories is refreshing as compared with say J. G. Fichte's ideas, which, no matter how consistent they may be, are sure to rejel people of common sense. Ørsted's treatment of the most important sections of the general part of criminal law is marked by supreme penetration. Among his contributions to the special part of criminal law mention should be made of his classic treatise on theft, remarkable for its novel and striking elucidation of the disputed concept of *animus lucri faciendi.*

Ørsted's participation in the discussions about the draft embodying a new criminal code for Bavaria is highly interesting. Little known, even in Germany, is the infinite rudeness almost amounting to libel, with which Feuerbach's opponent N. T. von Gönner, backed up by the Bavarian lawyer F. F. von Spies, fell upon Ørsted. But where are the two criminologists now? They have joined the host of the obscure.

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[1]) »Revision der Grundsätze und Grundbegriffe des positiven peinlichen Rechts« (I—II, Erfurt-Chemnitz, 1799—1800).

VII.

The task which Ørsted had to leave his successors to finish, was, as hinted above, the systematic sifting of the immense legal materials he had stored up. He had not been able to complete this within the comparatively brief space for literary work which was granted him. But the heritage descended to a number of competent jurists, such as J. E. Larsen,[1]) P. G. Bang,[2]) A. W. Scheel,[3]) F. T. J. Gram[4]) and J. Nellemann,[5]) who, without possessing the genius or originality of their master, were nevertheless solid and well-informed helpers. The reaction from

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[1]) 1799—1856, a professor, president of the Supreme Court, legal historian, writer on constitutional and private law, also on judicial procedure

[2]) 1797—1861; a professor, president of the Supreme Court. Subject Roman law, a writer on procedure

[3]) 1799—1879, a professor, judge advocate-general, Minister of Justice Subjects military and private law

[4]) 1816—71, a professor Subjects. law of property and maritime law.

[5]) 1831—1906, a professor, Minister of Justice, writer on procedure.

Ørsted which is indicated by the speculative interregnum that F. C. Bornemann[1]) ushered in, did not last for long, and the gap between Ørstedian realism and Bornemannesque speculation was bridged over by Goos,[2]) who in his mind combined some of the distinctive gifts of the two men.

It is ordinarily futile to attempt a prediction as to the future and its ways. Yet just as it is a fact that Ørsted's gigantic figure towers to greater and greater glory in Danish legal research and in Danish legal life, so there is nothing to show that this glory will fade in times to come.

Danish jurisprudence will preserve strength and vitality, if it continues to be animated by the true and healthy spirit of Anders Sandøe Ørsted. Nor, surely, would it be to the detriment of European and American jurists, if they acquainted themselves with the juristic achievements of this original and profound mind. If the present essay, brief though it is, could make a modest contribution to the attainment of this end, the object of its publication would be accomplished.

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1) 1810—61; the son of M. H. Bornemann, see above p. 23, a professor, legal philosopher and criminologist.

2) 1835—1917; a legal philosopher and criminologist. The greatest jurist of Denmark only second to Ørsted.

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